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No. 90-1533

In the Supreme Court of the United States

OCTOBER TERM, 1990

PHILIP CARDILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 p.

QUESTIONS PRESENTED

1. Whether petitioner's absence from trial due to illness during a co-defendant's closing argument, the prosecutor's rebuttal argument, and the court's charge to the jury constitutes reversible error under Federal Rule of Criminal Procedure 43 or the Due Process Clause.

2. Whether there was sufficient evidence that petitioner supervised five or more persons to support his conviction for operating a continuing criminal enterprise, in violation of 21 U.S.C. 848.

3. Whether the district court abused its discretion by refusing petitioner's request to issue a subpoena for a witness or by declining to admit evidence impeaching that individual's credibility, when he did not appear at trial to testify.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 908 F.2d 728.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990. A petition for rehearing was denied on November 13, 1990. Pet. App. 24-25. On January 22, 1991, Justice Kennedy extended the time within which to file a petition for certiorari to and including April 1, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848, one count of conspiring to violate the Travel Act, in violation of 18 U.S.C. 371 and 1952(a), one count of conspiring to import controlled substances, in violation of 21 U.S.C. 963, three counts of importing cocaine, in violation of 21 U.S.C. 952(a), and three counts of importing marijuana, in violation of 21 U.S.C. 952(a). He was sentenced to a total of 25 years' imprisonment and a $190,000 fine. The court of appeals affirmed. Pet. App. 1-23.[1]

1. The evidence at trial showed that from 1983 to 1986 petitioner participated in a substantial narcotics importation business. On at least nine occasions, two members of the organization, James Coley and Michael Munday, posed as charter airplane pilots and flew women, including Joyce Coley, Lisa Cardilli, and Nancy Sims, to the Bahamas as if they were taking a vacation. After dropping the women off in the Bahamas, Munday and Coley flew to Colombia, picked up cocaine, and returned to the Bahamas, where they dropped the cocaine to petitioner. Petitioner then smuggled the cocaine into the United States by boat. Petitioner employed Daniel Sims, William Cossin, and a man named Vince in his smuggling operation. Pet. App. 2-3.

In August 1983, petitioner and other members of the organization also smuggled a large quantity of marijuana into the United States. The marijuana was stowed inside a freighter that sailed from the Bahamas. Pet. App. 3. During that operation, Frank Bahmann and petitioner's

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[1] The court of appeals vacated petitioner's separate conviction and concurrent sentence on the count charging him with conspiracy to import controlled substances. Pet. App. 22.

co-defendant Steven Bucchiere acted at petitioner's behest. Gov't C.A. Br. 9-10. Beginning in 1985, the organization bypassed the Bahamas and smuggled narcotics directly from Colombia into the United States. Pet. App. 3.

2. At trial, the government introduced into evidence a videotape of a February 2, 1985, conversation between petitioner and Cary Cole, a government informant. During that conversation, petitioner told Cole that he had reduced his smuggling crew down to a fifth of what it had been. Pet. App. 13, 17. In closing argument, the prosecutor referred to that conversation as evidence that petitioner had managed five or more persons as part of his continuing criminal enterprise, as required by 21 U.S.C. 848.

Although Cole was on the government's pretrial witness list, the government did not call him as a witness at trial. Petitioner asked the district court to subpoena Cole to testify; petitioner also sought to call five police officers to testify about Cole's lack of credibility. The district court concluded that Cole's credibility was not at issue and therefore refused to issue the subpoena or allow petitioner to introduce evidence impeaching Cole's credibility. Pet. App. 17-18.

After closing arguments by the prosecutor and petitioner's counsel, petitioner became ill and had to be taken to a hospital. Petitioner was therefore absent during a co-defendant's closing argument, the prosecutor's rebuttal argument, and the court's charge to the jury. Petitioner did not object to the continuation of the trial in his absence. Pet. App. 21-22.

3. The court of appeals affirmed. Pet. App. 1-23. In the court of appeals, petitioner contended that the government failed to prove that he managed at least five persons, as required by the continuing criminal enterprise statute. *Id.* at 12. The court pointed out that the "government presented extensive evidence on [petitioner's] key role in

organizing and coordinating the pick-up and transportation of drugs by boat," *ibid.*, and that petitioner "concedes that the evidence demonstrated that Daniel Sims, William Cossin, and Vince were boat crewmen," *id.* at 12-13. Moreover, the court specifically noted that "by his admission on February 2, 1985, in a videotaped conversation, [petitioner] stated that he had reduced his crew down to a fifth of what it had been." *Id.* at 13. "If the jury believed this evidence, as it had a right to do," the court concluded, "five or more persons were managed by [petitioner]." *Ibid.* The court therefore rejected petitioner's challenge to the sufficiency of the evidence on that element of the offense.

Petitioner next argued that the "district court's refusal to either subpoena Cole or permit [petitioner] to impeach Cole's credibility" constituted reversible error. Pet. App. 17. The court of appeals determined that the "evidence against [petitioner] * * * came not from Cole, but from [petitioner's] fellow co-conspirators, from [petitioner's] own admissions on the videotape, and from statements [petitioner] made to an undercover agent." *Ibid.* "Because Cole never testified," the court of appeals concluded, "the district court properly exercised its broad discretion by not allowing Cole's credibility to become an issue." *Id.* at 17-18 (citing *United States* v. *Solomon*, 686 F.2d 863, 874 (11th Cir. 1982)).

Petitioner also claimed that "the district court erred by proceeding with the trial during his involuntary absence." Pet. App. 21. The court of appeals rejected that claim, holding that petitioner's counsel "waived any prejudice resulting from his absence by failing to object to proceeding with the trial in his absence." *Ibid.* (citing *United States* v. *Jones*, 527 F.2d 817, 830 (D.C. Cir. 1975)). In any event, the court noted that during petitioner's absence, his counsel

"continued to vigorously represent [petitioner's] interests." Pet. App. 22.[2]

ARGUMENT

1. Petitioner contends (Pet. 9-16) that the continuation of the trial during his absence violated Federal Rule of Criminal Procedure 43 and the Due Process Clause.

a. Rule 43(a) provides, in pertinent part, that "[t]he defendant shall be present * * * at every stage of the trial." Application of that provision alone, however, does not resolve petitioner's claim. Federal Rule of Criminal Procedure 51 makes clear that to preserve a right at trial, a party must "make[] known to the court the action which that party desires the court to take or that party's objection to the action of the court." See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 162 (1982). And in *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985), this Court held that "failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right."

Here, petitioner was well aware that the trial, *i.e.*, the remaining closing arguments and the court's charge to the jury, would proceed despite his absence. Nevertheless, petitioner failed to object to the continuation of his trial in his absence at any point—at the time of his absence, when he

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[2] The court of appeals also rejected petitioner's claims that juror misconduct mandated a new trial, that the district court erred in instructing the jury about the continuing criminal enterprise charge, that the district court responded incorrectly to the jury's request to review certain documents, and that the district court should have granted petitioner's request for a severance. Pet. App. 7-10, 16-17, 18-19, 19-21. Judge Anderson filed a dissenting opinion on the juror misconduct issue. *Id.* at 22-23. Petitioner has not sought further review of any of these claims.

returned to court, or in post-trial motions. In these circumstances, as the court of appeals held, Pet. App. 21-22, petitioner forfeited his right under Rule 43 to be present at "every stage of the trial."

Petitioner seeks to avoid the straightforward application of Rule 51 and *Gagnon* by asserting that "a defendant's involuntary absence, for whatever reason, does not constitute a waiver of his right to be present [at trial]." Pet. 12. Neither the terms of Rule 51 nor the rationale of this Court's decision in *Gagnon* supports such an exception to the well-settled principle providing for forfeiture of legal claims in the absence of a timely objection. See, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); see also 3A C. Wright, *Federal Practice and Procedure: Criminal 2d* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies to "all kinds of rulings at the trial"). Rule 51 requires an objection in all instances. Here, petitioner's counsel could have objected to the continuation of the trial when illness forced petitioner to leave, compare *United States* v. *Fontanez*, 878 F.2d 33, 34 (2d Cir. 1989).[3] Moreover, although *Gagnon* involved a voluntary absence from one part of the trial, this Court made clear that in order for a defendant to preserve his rights under Rule 43, he must "invoke his right to be present under Federal Rule of Criminal Procedure 43." 470 U.S. at 529. The Court held that the defendants in that case had forfeited their rights

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[3] For that reason, petitioner's suggestion (Pet. 12) that the decision below conflicts with *Fontanez* is without merit. Petitioner also mistakenly relies (Pet. 12) on *United States* v. *Hernandez*, 873 F.2d 516 (2d Cir. 1989), since defense counsel in that case specifically objected to the trial court's proceeding with the case in his client's absence. *Id.* at 517.

under Rule 43 because "[n]o objections of any sort were lodged." 470 U.S. at 528.

Petitioner's temporary absence from the trial does not amount to a "[p]lain error[] * * * affecting substantial rights." Fed. R. Crim. P. 52(b).[4] Petitioner was present at trial for the impanelling of the jury, the taking of evidence, the charge conference, the prosecutor's closing argument, and his own counsel's summation. He was absent only during his co-defendant's closing argument, the prosecutor's rebuttal, and the court's charge to the jury. As the court of appeals pointed out, "[d]uring [petitioner's] absence, [his] counsel continued to vigorously represent [petitioner's] interests." Pet. App. 22. In these circumstances, petitioner's brief absence from the proceedings could not have prejudiced him. See *United States* v. *Young*, 470 U.S. 1, 15 (1985).

b. Petitioner's claim fares no better under the Due Process Clause. This Court has held that the Due Process Clause guarantees a defendant "the right to be present at any stage of the criminal proceeding that is crucial to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky* v. *Stincer*, 482 U.S. 730, 745 (1987); see also *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934). Petitioner's brief absence from the proceedings in this case does not rise to the level of a constitutional violation, since the portions of the trial that he missed either did not directly pertain to him or concerned matters as to which his presence could not materially have affected the proceedings.[5]

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[4] For that reason, petitioner errs in asserting (Pet. 14-15) that this case involves an application of the harmless error doctrine.

[5] Petitioner asserts (Pet. 12) that the court of appeals' decision may not be squared with *United States* v. *Gordon*, 829 F.2d 119 (D.C. Cir. 1987) (requiring defendant's on-the-record waiver in open court in order

2. Petitioner next contends (Pet. 16-19) that, under the principle set forth in *Opper* v. *United States*, 348 U.S. 84 (1954), and *Smith* v. *United States*, 348 U.S. 147 (1954), his conviction for operating a continuing criminal enterprise may not stand, since the government's proof on the essential element of supervising five or more persons consisted entirely of his uncorroborated admission—his conversation with Cole on February 2, 1985.

At the outset, *Opper* and *Smith* are inapplicable here since independent evidence corroborated petitioner's admission. Petitioner concedes (Pet. 17) that the government presented evidence proving that he supervised three persons. In addition, evidence at trial showed that petitioner supervised two other persons during the August 1983 marijuana importation. See Pet. App. 3. The record thus contained evidence independent of petitioner's videotaped admission that he supervised at least five other persons in connection with his participation in the narcotics organization.

In any event, even if petitioner's admission were treated as uncorroborated, the principle set forth in *Opper* and *Smith* would not apply. Those decisions require corroboration for confessions "to prevent 'errors in convictions based upon untrue confessions alone.'" *Smith*, 348 U.S. at 153 (quoting *Warszower* v. *United States*, 312 U.S. 342, 347 (1941)). In *Smith*, this Court reasoned that confessions—standing alone—may be unreliable because they may be "coerced or induced." 348 U.S. at 153. As the Court recognized, a statement's reliability "may be suspect if it is extracted from one who is under the pressure of a police

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to forfeit constitutional right to presence at trial, where defense counsel had previously asked the trial court to proceed with jury selection in his client's absence). Since petitioner's brief absence from trial did not result in a constitutional violation, even the *Gordon* court would not have required a personal on-the-record waiver. See 829 F.2d at 126-127 n.8.

investigation." *Ibid.* In other words, the principle articulated in *Opper* and *Smith* seeks to avoid convictions based solely on the accused's potentially unreliable incriminating statements.

That principle does not apply where, as here, the defendant made the statement at issue to a person believed to be an accomplice, while the crime was still in progress. See, *e.g.*, *Opper*, 348 U.S. at 90 (only admissions "subsequent to the crime" raise danger of conviction on unreliable statement). Such statements do not raise the specter of unreliability; when the crime is in progress, the defendant presumably is free to speak as he sees fit. See, *e.g.*, *Government of the Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142 (3d Cir. 1985); *United States* v. *Soteras*, 770 F.2d 641, 644 n.4 (7th Cir. 1985); *United States* v. *Pennell*, 737 F.2d 521, 536-537 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Head*, 546 F.2d 6, 9 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977); *Kaneshiro* v. *United States*, 445 F.2d 1266, 1270 (9th Cir.), cert. denied, 404 U.S. 992 (1971). In this case, petitioner made the incriminating statement at issue during the course of the criminal conduct charged in the indictment, and he was speaking to someone he assumed was a confederate in crime. In this setting, potentially coercive influences—the linchpin of *Opper* and *Smith*—are wholly lacking. Since the statement bore the earmarks of reliability, the court of appeals properly considered it in concluding that there was sufficient evidence to support petitioner's conviction for operating a continuing criminal enterprise.

3. Finally, petitioner contends (Pet. 19-25) that the district court erred in refusing his request to issue a subpoena for Cole, and by then declining to admit evidence impeaching Cole's credibility when Cole did not appear to testify. In petitioner's view, this Court's decisions in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), and *Lego* v. *Twomey*,

404 U.S. 477 (1972), obligated the trial court to allow him to present evidence regarding the circumstances under which he made the February 2, 1985, statement to Cole.

In *Crane* and *Lego*, this Court held that a trial court's determination that a defendant's confession was voluntary does not preclude him from presenting evidence regarding the reliability of that confession. *Crane*, 476 U.S. at 688-689; *Lego*, 404 U.S. at 485-486. Those decisions rest on the premise that when a defendant voluntarily gives a statement to police officers, evidence regarding the means by which the statement was obtained may still cast doubt on its reliability. See *Crane*, 476 U.S. at 689; *Lego*, 404 U.S. at 485-486. No such concerns obtain here. Petitioner did not make a confession to police officers under circumstances giving rise to questions regarding whether it was given voluntarily; instead, the government introduced a videotape in which petitioner made an admission to an undercover informant. The jury viewed the videotape and could readily determine the reliability of petitioner's statement; there was no reason to admit evidence regarding the circumstances under which petitioner made the statement. Accordingly, the district court exercised sound discretion in denying petitioner's request to subpoena Cole. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

Nor did the district court err in refusing to allow petitioner to present testimony impeaching Cole's credibility. As the court of appeals pointed out, "evidence against [petitioner] * * * came not from Cole, but from [petitioner's] fellow co-conspirators, from [petitioner's] own admissions on the videotape, and from statements [he] made to an undercover agent." Pet. App. 17. Since Cole's credibility was not at issue, the district court properly excluded petitioner's proffered impeachment evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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